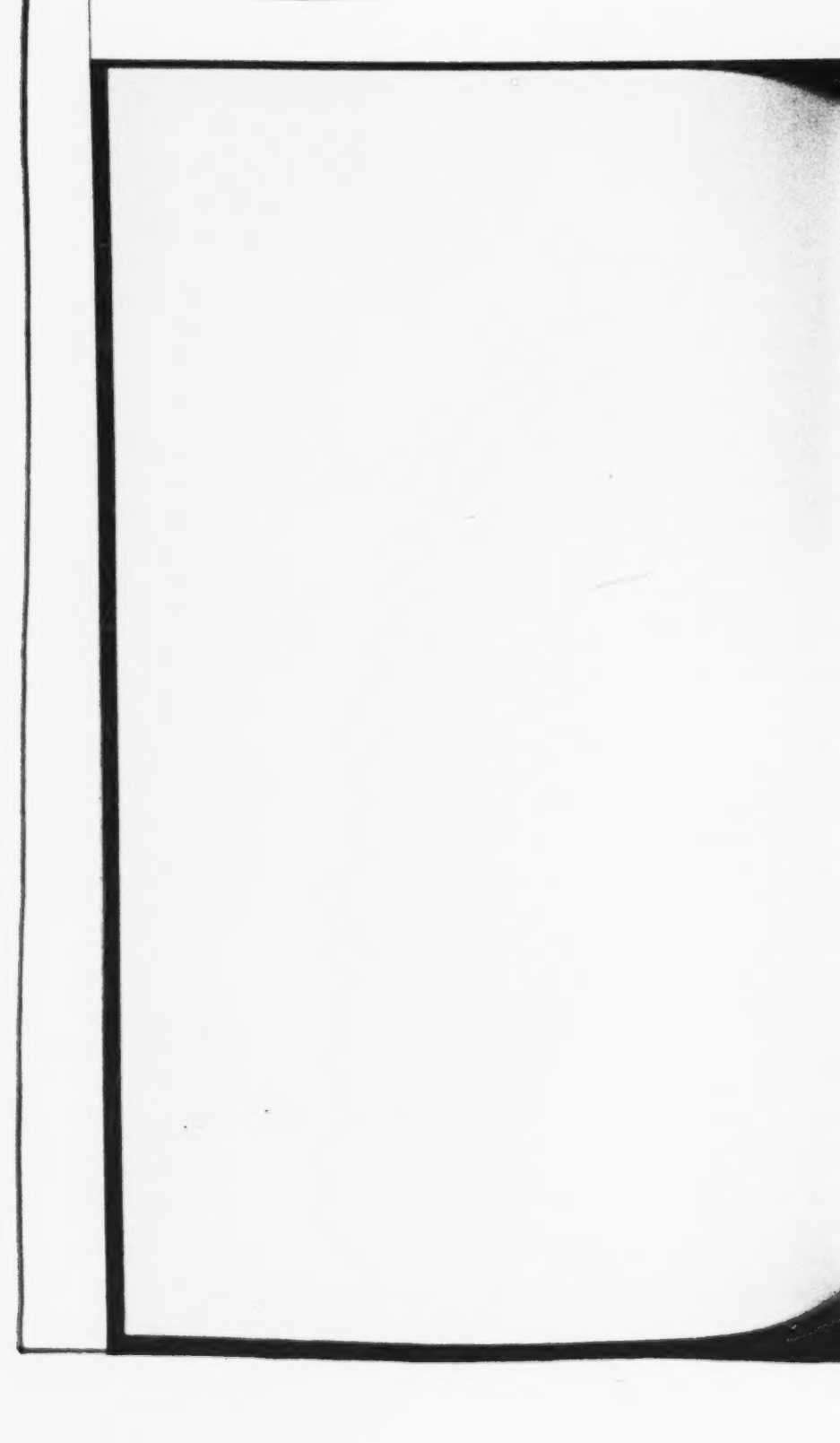

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

STATEMENT OF THE CASE

Petitioner, a Selective Service registrant, was classified I-A by his local board on March 3, 1964. On June 16, 1964, he was ordered to report for induction (Appendix [hereinafter A.] 50). Before his induction date he wrote to his local board requesting conscientious objector status, stating that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so" (A. 51). On January 19, 1966, the local board declined to reopen petitioner's classification (A. 59). In response

to petitioner's inquiry the board advised him by letter that it had declined to reopen his classification because his claim to conscientious objection "was not a change in your status which was beyond your control" (A. 61). Petitioner's induction order was renewed, and he refused to submit to induction.

Petitioner was indicted in the District Court for the Northern District of California for violating 50 U.S.C.App. section 462 (A. 7-9). He was tried by the Court, found guilty, and sentenced to two years' imprisonment (A. 6). The central issue at petitioner's trial was whether the crystallization of his claim to conscientious objection after an induction order was "a change in the registrant's status resulting from circumstances over which the registrant had no control," within the meaning of 32 C.F.R. §1625.2. The District Court held that it was not, although the Court stated that if it had been sitting in the Second Circuit where the opposite rule prevails, it would have been bound to acquit petitioner (A. 22).

The majority of the panel of the Court of Appeals for the Ninth Circuit which heard petitioner's appeal took the view that the crystallization of petitioner's claim *was* such a change in status, and accordingly entered an order and opinion reversing his conviction on September 11, 1968 (A. 25-28). 1 Sel.Serv. L.Rep. 3210. On October 23, 1968, the judgment was recalled and the appeal set to be heard en banc (A. 29-30). On February 2, 1970, the entire Court entered a judgment and opinion affirming petitioner's conviction by a vote of eight to five, the majority

holding that the District Court had correctly applied section 1625.2. 422 F.2d 332 (A. 31 et seq.).

A petition for writ of certiorari was granted by this Court on May 4, 1970. 38 U.S.L.Week 3430.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, sitting en banc, is reported at 422 F.2d 332 and at A. 31. An earlier and contrary panel opinion, not officially reported, is at 1 Sel.Serv. L.Rep. 3210 and at A. 25. The United States District Court for the Northern District of California did not render a written opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals was entered on February 2, 1970, 422 F.2d 332. The petition for writ of certiorari was filed on March 27, 1970, and was granted on May 4, 1970.

QUESTION PRESENTED

Whether Selective Service Regulation 32 C.F.R. § 1625.2 can validly preclude a local board from considering a registrant's claim of conscientious objection because it crystallized after the mailing of an order to report for induction.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, First Amendment, Freedom of Religion clause:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

United States Constitution, Fifth Amendment, Due Process clause:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law.

Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j):

> (j) Conscientious Objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Selective Service Regulations, 32 C.F.R. § 1625.2:

> The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Department of Defense Directive No. 1300.6:

> A request for discharge after entering military Service based solely on conscientious objection

which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained. This accords with Federal court holdings that a claim to exemption from military service under the Selective Service laws must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim.

SUMMARY OF THE ARGUMENT

32 C.F.R. §1625.2 (referred to throughout as "the Regulation") was promulgated by the Director of Selective Service, under the purported authorization of section 10(b)(1) of the Military Selective Service Act of 1967.[1] That section authorizes the President "to prescribe the necessary rules and regulations to carry out the provisions of this title." The Regulation, in pertinent part, states that:

> The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

The court below in construing the Regulation held that crystallization of conscientious objector beliefs can never be "a change in status resulting from cir-

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[1] 50 U.S.C. App. § 460(b)(1).

cumstances over which the registrant has no control" entitling the registrant to have his classification reopened.[2]

Petitioner urges that this construction is in error and that conscientious objection which matures after mailing of an induction order is "a change in status resulting from circumstances over which the registrant had no control."

The majority below reasoned as follows: First, that the acquisition of conscientious objector beliefs is within a registrant's control; second, that fraudulent claims for conscientious objector status made after induction orders have been issued might disrupt the orderly administration of the Selective Service system and make it impossible for local boards to meet manpower quotas. Judge Duniway, concurring, takes the position that crystallization of conscientious objector beliefs cannot result from circumstances over which a registrant has no control, since the workings of the human mind cannot be termed a "circumstance."[3] Judge Ely, also concurring, felt that the representations made by Ehlert in his claim for conscientious objector status could not support a finding by the local board that Ehlert claimed to be opposed conscientiously to war in any form or that his alleged beliefs crystallized after his receipt of his notice to report for induction.[4]

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[2] *Ehlert v. United States*, 422 F.2d 332 (9th Cir. 1970) (A. 31).

[3] *Ehlert v. United States*, 422 F.2d 332, 335 (9th Cir. 1970) (A. 35).

[4] *Id.*, at 335 (A. 36).

Petitioner maintains that claims which mature after mailing of an order to report for induction must be considered and reopened in appropriate cases for the following reasons: First, this is the only reasonable interpretation that can be reached based on the language of the Regulation, on the nature of conscience and the religious experience, and on modern concepts of psychology. Second, this result is compelled by the time-honored national policy affording a high degree of protection to conscientious objectors. Third, section 6(j) of the Act,[5] which is mandatory and unambiguous, requires the conscientious objector exemption to be paramount to any limiting regulation. Fourth, the decision below creates a "no-man's land," denying the statutory protection to one class of conscientious objectors which the laws grant to all others, in a manner neither fair nor reasonable. Petitioner further contends that Judge Ely's findings are unjustified based on the record before the court below and the action of the draft board.

Petitioner also urges that the administrative burden and effect on manpower requirements which may flow from this construction is slight, since Selective Service has existing procedures for accommodating postponements and cancellations of induction orders in many other situations. Any additional burden created is far outweighed by protection of the rights of conscientious objectors claiming exemption from military service.

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[5] 50 U.S.C. App. § 456(j), Military Selective Service Act of 1967, § 6(j) (hereinafter "§ 6(j)").

ARGUMENT

I. THE LANGUAGE OF THE REGULATION MUST BE CONSTRUED TO INCLUDE CONSCIENTIOUS OBJECTION WHICH CRYSTALLIZES AFTER THE ISSUANCE OF AN INDUCTION ORDER AS A CHANGE OF STATUS RESULTING FROM CIRCUMSTANCES BEYOND THE CONTROL OF A SELECTIVE SERVICE REGISTRANT.

The question before the Court is whether the crystallization of conscientious objector beliefs after the mailing of an order to report for induction can never be a change in status resulting from circumstances beyond the control of the registrant. This question has created widespread conflict among the Courts of Appeals. The leading case which expresses the rule urged by petitioner is *United States v. Gearey.*[6]

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[6]368 F.2d 144 (2d Cir. 1966), 379 F.2d 915 (2d Cir. 1967) (*after remand*), *cert. denied* 389 U.S. 959 (1967).

Accord: United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States v. Stafford,* 389 F.2d 215 (2d Cir. 1968); *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959); and *Capobianco v. United States,* ..... F.2d ....., No. 34,139 (2d Cir. Mar. 31, 1970). In addition to other authority in the District Courts, there is the dissent of Judge Bell in *United States v. Beaver,* 309 F.2d 273, 278 (4th Cir. 1962), *cert. denied* 371 U.S. 951 (1963); the dissent of Judge McCree in *United States v. Jennison,* 402 F.2d 51, 54 (6th Cir. 1968), *cert. denied* 394 U.S. 912 (1968); and the statement of Judge Tuttle, Senior United States Circuit Judge for the Fifth Circuit in *United States v. Blakeley,* 424 F.2d 1043, 1045 (9th Cir. 1970) that he would associate himself with the dissenters in *Ehlert.* See also *United States v. Bittinger,* No. 13,317 (4th Cir. Dec. 24, 1969). There the Court found the local board had erred in not hearing the registrant's claim of ministerial status arising after an order to report for civilian work had been mailed, saying, "[T]he call to a full-time vocation in the ministry comes to comparatively few men, and the reasons this call may be answered are too complex to be fathomed by perfunctory administrative decision."

Contra: The leading cases which agree with the *Ehlert* majority are *United States v. Beaver, supra; United States v. Jennison, supra; United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953); *United States v. Taylor,* 351 F.2d 228 (6th Cir. 1965); and *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

The rule of the *Gearey* Court is simple and straightforward. Conscientious objector beliefs which mature after an Order to Report for Induction has been mailed are a change of status resulting from circumstances over which a registrant has no control. Using this test, if the local board finds that the registrant's beliefs ripened only after an induction order has been mailed and that his beliefs prima facie qualify him for classification as a conscientious objector, then a change in status has occurred "resulting from circumstances over which the registrant had no control" and he would be entitled to be reclassified by the local board. If the registrant does not make the required showing, under the Regulation the board is free to refuse to reopen the classification and to leave the induction order in effect.

A. A Sincere Belief Against Participation in War in Any Form Acquired After Mailing of an Induction Order Must be Considered to be a Change in the Registrant's Status Resulting From Circumstances Over Which the Registrant Had No Control.

1. The Gearey Court, and the Ehlert dissenters, correctly reasoned that crystallization of conscientious objection results from circumstances beyond a registrant's control.

The view of conscience expressed by the Court below conflicts with the fundamental nature of such a claim. The majority declared that "Presumptively, every human is a rational being, having a free will and in complete charge of his own thinking."[7]

Dictates of conscience are matters beyond will, control and presumption. It is this presumption, expressed

[7] *Ehlert v. United States*, 422 F.2d 332, 334 (9th Cir. 1970) (A. 34).

by the *Ehlert* Court, which led to its conclusion. But it is unsound as an unquestioned starting point. The nature of conscience is a difficult question, and it may not be thus begged.

There are volumes of authority for the proposition that man is not entirely rational, that his possession of free will cannot be assumed, and that his thought processes are not his to control. This honorable Court has said that the nature of a belief adequate to support a claim for conscientious objection is one ". . . upon which all else is ultimately dependent."[8]

A belief so held, by its very definition, is not entertained at will; "conscience" and "control" mutually exclude one another.

Judge Merrill, dissenting below, clearly perceives the nature of conscience. He said,

> One simply cannot order his conscience be still or make himself believe what he does not believe . . .
>
> Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained.[9]

Judge Kaufmann, in his opinion in *Gearey,* noted the impact that an Order to Report might have upon one whose conscientious objector position was still inchoate:

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[8]*United States v. Seeger,* 380 U.S. 163, 176 (1965); *Welsh v. United States,* ..... U.S. ..... (1970), 38 U.S.L.Week 4486 (June 16, 1970), 3 Sel.Serv.L.Rep. 3001 (June 16, 1970).

[9]*Ehlert v. United States,* 422 F.2d 332, 339 (9th Cir. 1970) (A. 46).

> The realization that induction is pending, and that he soon may be asked to take another's life, may cause a young man to finally crystallize and articulate his once vague sentiments.[10]

Many registrants who have raised their conscientious objector beliefs only after the issuance of an induction order have chosen jail rather than to submit to induction—belatedly testifying to the sincerity with which they hold their belief. It does not serve this nation well to send to prison those who sincerely hold beliefs against participation in war in any form, whenever matured. Circuit Judge Bell articulated the result which flows from the *Ehlert* majority, when he said:

> The statute gives this man exemption, the Army does not want him, the jail will not change his religious beliefs, nor will the will of the people to fight for their country be sapped by a generous adherence to the philosophy behind this law.[11]

2. The Gearey rule is supported by traditional religious conversion experiences and modern psychoanalytic interpretation of similar phenomena.

Petitioner's contention that conscience is beyond the control of the human mind finds support in the timeless religious experience of conversion, and the corpus of modern psychology holds this position as basic.

Over a lifetime men change their views, some gradually, some suddenly. "Religious conversion is a specific instance of the general principle of change in

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[10]368 F.2d 144, 150.

[11]*United States v. Beaver*, 309 F.2d 273, 279 (4th Cir. 1962) (dissenting opinion), *cert. denied* 371 U.S. 951 (1963).

the process of human adaptation. Conversion is a generic term for change and generally implies a drastic alteration of a former state."[12]

Chambers, J., concurring below, saw the analogy to Saul of Tarsus in his reference to "the road to Damascus":[13]

> Now as he journeyed he approached Damascus, and suddenly a light from heaven flashed about him, and he fell to the ground and heard a voice saying to him, "Saul, Saul, why do you persecute me?" And he said, "Who are you, Lord?" And he said, "I am Jesus, whom you are persecuting; but rise and enter the city, and you will be told what to do."[14]

The story of the conversion of St. Paul is told in the exalted language of religious metaphors. Yet it is paradigmatic of a crystallization of previously inchoate ideas and feelings around some stimulus, into a coherent and stable structure. This common process is quite inconsistent with the notion that every human is at all times in complete charge of his own thinking.

As William James described it,

> We have a thought, or we perform an act, repeatedly, but on a certain day the real meaning of the thought peals through us for the first time, or the act has suddenly turned into a moral impossibility.[15]

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[12]Salzman, "Religious Conversion," in *Clinical Psychiatry and Religion* (Pattison, ed., 1969) 177.

[13]*Ehlert v. United States,* 422 F.2d 332, 338 (9th Cir. 1970) (A. 43).

[14]9 Acts. 3-6.

[15]James, *The Varieties of Religious Experience* (New Am. Lib. 1961) 162.

Instances of sudden crystallization of belief are legion. The following are only a few examples. Legend teaches that the sight of a beggar precipitated the conversion of both Francis of Assisi and the Gautama Buddha from sybarites to saints.[16]

In the Confessions of St. Augustine we read,

> Suddenly I heard a voice from some nearby house, a boy's voice or a girl's voice, I do not know; but it was a sort of sing-song, repeated again and again. "Take and read, take and read . . ." Damming back the flood of my tears I arose, interpreting the incident as quite certainly a divine command to open my book of scriptures and read the passage at which I should open. I snatched it up, opened it and in silence read the passage upon which my eyes first fell: Not in rioting and drunkenness, not in chambering and impurities, not in contention and envy, but put ye on the Lord Jesus Christ and make not provision for the flesh in its concupiscences [Rom. XIII, 13]. I had no wish to read further, and no need. For in that instant, with the very ending of the sentence, it was as though a light of utter confidence shone in all my heart, and all the darkness of uncertainty vanished away.[17]

The struggles of Martin Luther with the problem of divine justification were suddenly resolved in a tower at Wittenberg and led ultimately to his ninety-nine theses:

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[16]6 Catholic Encyclopedia 222 (1913); Aiken, *The Dhamma of Gotama the Buddha and the Gospel of Jesus the Christ* (Marlier & Co. Ltd., 1900) p. 72.

[17]Augustine, *The Confessions*, Books I-IX, trans. F.J. Sheed (Sheed & Ward, 1942), 146.

> The words "righteous" and "righteousness of God" struck my conscience like lightning. When I heard them I was exceedingly terrified. If God is righteous (I thought), he must punish. But when by God's grace I pondered, in the tower and heated room of this building, over the words, "He who through faith is righteous shall live" [Rom. 1:17] and "the righteousness of God" [Rom. 3:21], I soon came to the conclusion that if we, as righteous men ought to live from faith and if the righteousness of God should contribute to the salvation of all who believe, then salvation won't be our merit but God's mercy. My spirit was thereby cheered . . . The Holy Spirit unveiled the Scriptures for me in this tower.[18]

In another account of this experience he said:

> This immediately made me feel as if I was reborn, and as though I had entered through open gates into paradise itself. From then on, the whole face of Scripture appeared different.[19]

That the mind is not the master of the conscience is the teaching of both contemporary psychology and of religious philosophers:

> Many people mistakenly overestimate the role of will power and think that nothing can happen to their minds that they do not decide and intend. But one must learn to discriminate carefully between intentional and unintentional contents of the mind. The former are derived from the ego personality; the latter, however, arise from a

[18]Luther, *Table Talk*, 54 *Luther's Works* (ed. and trans. Tappert, Fortress Press, 1967), 193-94.

[19]Todd, *Martin Luther* (1964), 78.

> source that is not identical with the ego but is its "other side."[20]
>
> The mind gives the body an order, and is obeyed at once: the mind gives itself an order and is resisted . . . The mind I say commands itself to will: it would not give the command unless it willed: yet it does not do what it commands. The trouble is that it does not totally will: therefore it does not totally command.[21]

We would not recognize these men as great saints and scholars unless we recognized as true for ourselves their descriptions of thoughts, feelings, and convictions welling unbidden from our inner selves.

No policy requires a conclusive presumption that conscience is compellable, in the face of the general experience that it is not.

3. The time-honored national policy expressed in section 6(j) which exempts conscientious objectors requires that any regulation concerning conscientious objection be consistent with and authorized by that section.

This Court has long recognized the strong Congressional policy protecting registrants who claim conscientious objector status.[22] That policy has avoided and should continue to avoid forcing sincere applicants to choose between going to prison or violating their religious principles.

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[20]C. G. Jung, "Approaching the Unconscious," in *Man and His Symbols*, ed. C. G. Jung (Dell, 1969) 22.

[21]Augustine, *op. cit. supra*, n. 17, at 141.

[22]*United States v. Seeger*, 380 U.S. 163 (1965), where the Court exhaustively reviewed the history and purpose of section 6(j).

In *United States v. Seeger,* this Court, in construing the statutory language of section 6(j) broadly, stated that:

> This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.[23]

And the Court went on to state that

> We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words "merely personal" seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being.[24]

The Regulation now before the Court sets out the procedures to be followed whenever a request for a new and different classification, of any kind, is made after mailing of an induction order. Local boards and courts, finding no specific regulation with respect to post-induction-order conscientious objector claims, have applied this regulation to such claims as well as to those claims where observable physical facts are present as in hardship, physical fitness,[25] and sole

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[23]380 U.S. 163, 176 (1965).

[24]*Id.* at 186.

[25]50 U.S.C. App. § 456(h) authorizes the President to issue regulations providing for each of these deferments. See 32 C.F.R. § 1622.17, § 1622.44.

surviving son.[26] The construction placed on the Regulation by the Court below is in conflict with and unauthorized by the statute.[27]

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[26]50 U.S.C. App. § 456(o). See 32 C.F.R. § 1622.40.

[27]It can be persuasively argued as well that the Regulation is not only incorrectly construed, but is also invalid when applied to conscientious objections whenever they mature. 50 U.S.C. App. § 460 cannot constitutionally be regarded as conferring an unlimited rule-making power, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and regulations purporting to change, rather than implement, the statute are impermissibly in conflict therewith. *Trust Under the Will of Bingham v. Commissioner*, 325 U.S. 365 (1944); *Miller v. United States*, 294 U.S. 435 (1935). A regulation may not destroy rights which the legislature has conferred. *United States v. George*, 228 U.S. 14 (1912). The Regulation suffers from four such infirmities: (1) Since "nothing" shall require a conscientious objector to enter combatant service, it changes and destroys rights conferred in section 6(j) of the Act. (2) Since it distinguishes among conscientious objectors based solely on the irrelevant fact of when an induction order is mailed, *a fortiori* it is not "fair and just," thereby changing and destroying rights conferred in section 1(c) of the Act. (3) Since it permits local boards to make the *unappealable* determination of whether there has been a "change in status due to circumstances over which the registrant had no control," it changes and destroys the protective rights conferred in section 10(f)(3) of the Act that local boards are empowered only to "hear and determine, subject to the right of appeal . . ."

> The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purpose of the act—not to amend it. [citation omitted] *Miller v. United States*, 294 U.S. 435. 440 (1935)

And (4) Since it instructs a local board to make a specific finding on the occurrence of "circumstances," which, as shown in I.A.2 *supra* can include a religious conversion experience, it empowers the board to question the validity of a registrant's belief that such a religious experience has occurred to him, an inquiry which is foreclosed to the Government. *United States v. Seeger*, 380 U.S. 163, 184 (1965).

Section 6(j) of the Act does not contain a pre-notice-of-induction time limitation on the right to claim conscientious objector status, and the construction of the Regulation as adopted below is contrary to the intent of Congress and the clear language by which its intent was expressed.[28]

The *Gutknecht* case involved the delinquency regulations (32 C.F.R. Part 1642), which the Government attempted to justify as reasonable under section 10 of the Act. This Court rejected that argument, holding that since the delinquency regulations affected specific provisions of the Act (i.e., selection, section 5; and deferments and exemptions, section 6), the authorization for those regulations must be found in the specific sections to which they relate, and if no such authorization can be found, the regulations are unauthorized by statute and invalid.

The absence of a provision in the statute creating a duty assertedly established by a regulation necessitates a finding that there is no such duty. *Toussie v. United States.*[29]

In *Oestereich,* where this Court was asked to deprive a registrant of a statutory ministerial student's exemption by use of the delinquency regulations, this Court stated:

> There is no suggestion in the legislative history that, when Congress has granted an exemption

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[28] *United States v. Gutknecht,* 396 U.S. 295 (1970); *Breen v. Selective Service Board,* 396 U.S. 468 (1970); *Toussie v. United States,* ..... U.S. ....., 38 U.S.L.Week 4181 (1970); *Oestereich v. Selective Service Local Board* #1, 393 U.S. 233 (1968).

[29] ..... U.S. ....., 38 U.S.L.Week 4181 (1970).

> and a registrant meets its terms and conditions, a board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption.[30]

In this case, the specific section of the Act granting the exemption for conscientious objection is explicit:

> *Nothing* contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. (Emphasis supplied.)[31]

In light of the lessons of *Gutknecht, Breen, Toussie* and *Oestereich,* when, as here, the authorization for the construction of a regulation is not found in the specific section to which it relates, both the Regulation and the construction placed on it are invalid when it is applied to a claim for conscientious objector status.

The absence of a provision in the statute creating a pre-notice-of-induction time limit on the right to claim the exemption compels the conclusion that there is no such time limit. *Toussie v. United States.*[32] As Judge Ganey said in *United States v. Underwood:*

> It is plain that a person meeting the conditions of the above section of the Act [6(j), Military Selective Service Act of 1967] is not to be subjected to combatant training and service. This

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[30] 393 U.S. 233, 237 (1968).

[31] 50 U.S.C. App. § 456(j).

[32] ___ U.S. ....., 38 U.S.L. Week 4181 (1970).

> privilege is not to be defeated by procedural regulations. Nowhere in the Act does it provide that unless the registrant makes his claim before notice of induction he thereafter waives his right to the privilege. Had Congress so intended, it would have set forth such intention in unmistakable terms.[33]

In *Quaid v. United States*,[34] a reservist who had failed to participate satisfactorily in reserve meetings was certified and ordered for priority induction by his local board under otherwise appropriate standards,[35] even though he had previously filed a conscientious objector claim with his board. The local board relied on 32 C.F.R. § 1631.8, which provides that in the case of a delinquent reservist the board "shall order" him for induction "without changing his classification," and refused to consider his claim. The Court held that the language of section 6(j) was absolute and it followed therefrom that the local board was required to consider and dispose of his claim before sending him an induction notice. The Court further noted that section 6(c)(2)(D) of the Act states that delinquent reservists "*may* be selected for training and service . . . prior to the selection and induction of other persons liable therefor" (emphasis supplied), and held that Congress had used the permissive language "may be selected" because

> it knew there might be cases in which priority induction would be inappropriate because it

[33] 151 F.Supp. 874, 876 (E.D.Pa. 1955).
[34] 386 F.2d 25 (10th Cir. 1967).
[35] 50 U.S.C. App. § 456(c)(2)(O); 32 C.F.R. § 1631.8.

would violate the emphatic, imperative provision of section 456(j) that a conscientious objector shall not be required to serve in the armed forces.[36]

It is, as Judge Merrill stated in his dissenting opinion below, "beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law."[37]

4. Under the majority holding below, a registrant who acquires beliefs against war after his order to report for induction is mailed but before his reporting date is forever precluded from asserting his claim.

A claim of conscientious objection advanced prior to the mailing of an induction order must be considered by the local board and the classification reopened if a prima facie showing is made.[38] The local board

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[36]386 F.2d 25, 29. This reasoning concerning conflict with the clear mandate of section 6(j) was adopted verbatim by the Ninth Circuit in *Olson v. United States*, ... F.2d ....., 2 Sel. Serv.L.Rep. 3637 (9th Cir. 1970), and is equally persuasive here. *Lurie v. United States*, 402 F.2d 297 (5th Cir. 1968); and *Schmitt v. United States*, 413 F.2d 219 (5th Cir. 1969), *cert. denied* ..... U.S. ....., 24 L.Ed.2d 423 (1969).

[37]*Ehlert v. United States*, 422 F.2d 332, 339 (A. 46). See also *United States v. Gearey*, 368 F.2d 144, 144-50 (2d Cir. 1966); Note, *Pre-induction Availability of the Right to Claim Conscientious Objector Exemption*, 72 Yale L.J. 1459 (1963); Note, *Ninth Circuit Review: Selective Service*, 21 Hastings L.J. 1038, 1043 (1970).

[38]*Mulloy v. United States*, ... U.S. ....., No. 665, October Term, 1969, June 15, 1970; 38 U.S.L.Week 4509 (1970); *Stain v. United States*, 235 F.2d 339 (9th Cir. 1956); *United States v. Freeman*, 388 F.2d 246 (7th Cir. 1967); *Olvera v. United States*, 223 F.2d 880 (5th Cir. 1955); *United States v. Vincelli*, 216 F.2d 681 (2d Cir. 1954).

cannot deny the claim unless its action is supported by a basis in fact.[39]

On the other hand, if the claim is first advanced after induction, it must be considered by the military under the applicable regulations adopted by each branch of the armed forces allowing for applications for discharge on the basis of conscientious objection which has arisen subsequent to entry into the service. Department of Defense Directive 1300.6 issued May 10, 1968, provides, in pertinent part:

> [R]equest for discharge after entering military service based solely on conscientious objection which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained.

However, due to the combined effect of this directive with the rule adopted by the Ninth Circuit, a registrant whose views against participation in war mature after his induction order has been mailed but before his induction date can never present his claim to either Selective Service or military authorities. The creation of a "no man's land" for conscience which asserts itself after an induction order but before induction is not required by the language of the Regulation. The unambiguous language of section 6(j) of the Act does not permit a reading of the

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[39] *Dickinson v. United States*, 346 U.S. 389 (1953); *Witmer v. United States*, 348 U.S. 375 (1955).

Regulation which creates a "no man's land" for claims of conscience which mature unseasonably.[40]

Congress did not intend to create a class of conscientious objectors who, because their conscience spoke unpropitiously, are excluded from section 6(j)'s exemption. Indeed, any congressional enactment making such a distinction would raise serious constitutional questions. Assuming that the exemption for conscientious objectors is in fact a matter of legislative grace not compelled by the First Amendment's free exercise of religion guarantee, still government may not arbitrarily and unreasonably grant the exemption privilege to some and deny it to others.[41]

A law affecting fundamental religious liberties cannot, in the absence of some compelling state interest, draw distinctions between religious beliefs.[42] Such distinctions, usually condemned as a violation of the guarantee of equal protection of the laws, also violate the guarantee of due process of law contained in the Fifth Amendment.[43]

A governmental policy extending exemption to claims of conscience maturing prior to an induction order and after submission to induction, but denying exemption to claims of conscience arising between those times, would be an unjustifiable and invidious

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[40] *Ehlert v. United States*, 422 F.2d 332, 338 (dissent) (A. 44).

[41] U.S. Const. amend. I; *Sherbert v. Verner*, 374 U.S. 398 (1963).

[42] *Sherbert v. Verner*, 374 U.S. 398, 403, 406. And see *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

[43] U.S. Const. amend. V; *Bolling v. Sharpe*, 347 U.S. 497 (1954).

discrimination. The language of section 6(j), however, does not even remotely suggest such a policy, and the Regulation should not be construed in a manner which produces such a questionable result.

5. Judge Duniway's concurring opinion in the case below misconceives the nature of the term "circumstance" in 32 C.F.R. § 1625.2.

Judge Duniway, concurring below, asserted that the mental and spiritual processes which impel a registrant to adopt certain religious beliefs are not "circumstances," and therefore do not fall within the language of the Regulation.[44]

If a registrant's father is suddenly killed in a plane crash, leaving the registrant as the sole support of his entire family, the local board would be required to reopen and reclassify the registrant. The change in status, i.e., the change in the family's financial dependency, qualifies the registrant for deferment under the Selective Service regulations.[45] This change, resulting from a plane crash, is clearly an external event beyond the registrant's control meriting reopening. However, in Judge Duniway's view, if a registrant should have a sudden change in his state of mind, such that had this change occurred prior to receipt of his induction order he would have clearly qualified for conscientious objector status, whether this change were due either to some external event, such as the receipt of an induction order, or to some

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[44] *Ehlert v. United States*, 422 F.2d 332, 335 (A. 35).

[45] 32 C.F.R. § 1622.30(b). A similar situation occurred in *Petrie v. United States*, 407 F.2d 267 (9th Cir. *en banc* 1969).

internal event such as a religious conversion or an emergence to consciousness of unconscious thoughts, this registrant would not be entitled to reopening or reclassification.

Judge Merrill exposed the fallacy of the Duniway position when he stated that:

> A "change in the registrant's status" under the regulation can have reference only to a change in the registrant's right to a particular classification. "Circumstances" in this context can have reference only to the conditions relevant to such a change of status. In the case of the conscientious objector status the only relevant condition or circumstance is the registrant's state of mind. The effect of the majority's construction is to single out conscientious objector as one status entitled to no consideration at this stage of the proceedings.[46]

Clearly Congress and Selective Service did not intend such a discriminatory result.

6. The record in this case clearly presents both the substantive and procedural issues which underlie a correct interpretation of the Regulation.

In contrast to the facts of the case at hand, the petitioner in the *Gearey* case, after having filed his application for conscientious objector status after receipt of an order to report for induction, was invited by his local board to appear for an interview. Upon conclusion of that interview the board informed Gearey that it believed he was not a "genuine C.O."

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[46] *Ehlert v. United States*, 422 F.2d 332, 338 (dissent) (A. 44).

and that the facts he presented did not warrant a change in his classification.[47]

Here, no interview was granted. The local board, in a personal letter to petitioner, advised him that it had not reopened his classification because his claim to conscientious objector status "was not a change in your status which was beyond your control." (A. 61).

The board never reached the question of the genuineness of Ehlert's claim and made no finding as to when his claim in fact matured. The District Court, however, reviewed the complete record in Ehlert's case and at trial, after hearing and argument, stated "if this were a case in Judge Kaufman's Circuit . . . [the 2d Circuit] . . . I would feel, based on the record before me, I would have to acquit the accused" (A. 22). This statement puts to rest the problem expressed in Judge Ely's concurring opinion that the District Court may not have decided the issues here presented.[48]

Thus, as noted in the Petition for Certiorari, eleven of the thirteen judges of the Court below perceived that this case squarely presented the question of the proper interpretation of the Regulation at issue. The substantive issue of the genuineness of Ehlert's belief had previously been determined by the District Court.

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[47] *United States v. Gearey*, 379 F.2d 915, 917 (2d Cir. 1966).
[48] *Ehlert v. United States*, 422 F.2d 332, 335 (A. 36).

II. THE RESULT URGED BY PETITIONER PLACES NO SIGNIFICANT BURDEN ON SELECTIVE SERVICE, AND CANNOT CONCEIVABLY DISRUPT THE MANPOWER REQUIREMENTS OF THE MILITARY.

Each month, upon the advice of the Secretary of Defense, the National Director of Selective Service issues to each State Director a call for a specified number of inductees.[49] Each State Director then issues to each local board within his state a call for a specified number of men, based upon their pool of registrants classified I-A acceptable.[50] The local board then determines which registrants are to be called, from the order of call provisions,[51] and issues to those registrants an order to report for induction.[52]

When a registrant who has been issued an order to report is able to postpone or cancel his induction, there will then be less registrants reporting than the local board has ordered. The provisions of 32 C.F.R. § 1631.7(b) then govern:

> Whenever the number of postponements of induction materially reduces the number of men the local board actually can deliver in response to a call, the local board shall issue orders to report for induction to such numbers of additional men as may be necessary to meet the call, taking into account the number of men to be delivered following the expiration of postponements previously granted.

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[49] 32 C.F.R. § 1631.4.
[50] 32 C.F.R. § 1631.5.
[51] 32 C.F.R. § 1631.7(a).
[52] 32 C.F.R. § 1632.1.

If this Court reverses the decision below, this machinery is adequate to assume the negligible burden of brief delays in induction of the presumably small number of registrants who would then qualify for a reopening. If the registrant were to achieve a reopening, the local board simply issues additional induction orders pursuant to Regulation 1631.7(b). This is easily handled and often done. Some State Selective Service Headquarters have established routine procedures for handling conscientious objection claims in the manner urged by petitioner.[53] This minimal burden does not justify the discrimination inherent in denying the opportunity for reopenings to recently

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[53] "I. *Processing Conscientious Objector Claimants*

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"Whenever a registrant files his initial claim as a conscientious objector, the local board is requested to reopen his case under the provisions of SSR 1625.3(a) in order to give the registrant the right of personal appearance and appeal. The registrant's case should be reopened even though he filed his initial claim after he is under an order to report for induction."

State Headquarters, Selective Service System, Raleigh, North Carolina, Circular Letter No. 111-4-a;

"Registrants Claiming Conscientious Objector Status

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"If a registrant for the first time claims conscientious objector status . . . *after* an induction order has been mailed, the SSS Form 150 shall be issued to the registrant. . . . If the form is returned prior to the induction date and there will be no regularly scheduled meeting of the local board before the induction date, the registrant's induction shall be postponed. . . . The local board must then specifically determine if there has been a change in status resulting from circumstances over which the registrant had no control. . . . Should the local board determine that there has been a change in status beyond the registrant's control, the registrant may then be reclassified . . ."

State Headquarters, Selective Service System, Sacramento, California, Operation Memorandum (Class.) May 21, 1970 (emphasis in original).

crystallized claims of conscience when reopenings, reclassifications, and postponements are granted in many other situations, including but not limited to the following: when the registrant is a full-time university student,[54] when the registrant is preparing to take an upcoming Bar Examination,[55] where the registrant transfers his induction to his place of residence,[56] where the registrant is removed from delinquency status,[57] where the registrant is found physically unacceptable or unqualified at the induction center,[58] when the registrant enlists in the Army Reserves or National Guard,[59] and when an alien registrant leaves the country.[60] Likewise, other events may make him eligible for deferments such as extreme hardship, medical unfitness, as an irreplaceable employee in an occupation in the national interest,[61] or as a sole surviving son.[62] Petitioner urges that this Court should not allow a construction of the Regulation which requires different treatment for similar situations.

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[54]32 C.F.R. § 1622.15(b); *Marsano v. Laird*, 412 F.2d 65 (2d Cir. 1969); State Director Advice No. 763, as amended October 2, 1969, 2 Sel.Serv.L.Rep. 29.

[55]Local Board Memorandum No. 44, as amended December 29, 1961, 1 Sel.Serv.L.Rep. 2175.

[56]32 C.F.R. § 1632.9.

[57]32 C.F.R. § 1642.4.

[58]32 C.F.R. § 1622.17; Army Reg. 601-270, pars. 3-18(b)-(4), 4-20(2) and 4-21, 1 Sel.Serv.L.Rep. 2224, 2265-66.

[59]See 32 C.F.R. § 1622.13(f)(2) and (3).

[60]See 32 C.F.R. § 1622.42(c).

[61]32 C.F.R. §§ 1622.22 and 1622.23.

[62]32 C.F.R. § 1622.40(a)(10).

The majority opinion below fundamentally misunderstands the *Gearey* rule and petitioner's position.

The majority below justified this discrimination against conscientious objector claimants on the grounds that:

> A Board can readily ascertain the validity of an "extreme hardship," "sole surviving son," and other such claims and can dispose of them, without difficulty, one way or the other, prior to the reporting date. The exact opposite is true of a claim of exemption based on conscientious objection. An adjudication on the sincerity of a registrant's conscientious objection requires an exploration in depth into his past and present family, religious and vocational life. After such an adjudication, if we followed *Gearey* and similar authorities, it would then be necessary to make the additional adjudication on when there was a crystallization or maturing of the registrant's views. No such procedure is contemplated by the regulation under scrutiny.[63]

Using the *Gearey* standard, the initial determination by the Board is only if a prima facie showing has been made by the registrant's claim, that his professed beliefs have matured after the induction order was mailed and that this resulted from circumstances beyond his control. The local board makes this determination by a fair reading of the registrant's own statements. The law does not require any kind of detailed inquiry into his sincerity and past history. If the registrant fails to make the required

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[63] *Ehlert v. United States*, 422 F.2d 332, 334 (9th Cir. 1970) (A. 34).

prima facie showing, the board cannot reopen and must leave the induction order in effect.[64]

Even when a registrant succeeds in meeting the reopening standard contained in the Regulation, he is entitled only to a short personal appearance before the local board,[65] and an appeal to the State Appeals Board at which a determination is made strictly from the file, with no new evidence taken and no appearance by the registrant.[66] Such matters, should Selective Service choose, could be given top priority and decided in a matter of weeks.

This is exactly the same kind of determination a board must make in deciding whether to reopen for consideration any other type of claim presented after an induction order has been issued. All cases require only an initial finding by the board as to whether the registrant meets the post-induction-order reopening standard of change of status resulting from circumstances beyond a registrant's control.

Even the processing of fraudulent conscientious objector claims does no more than delay inevitable

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[64]It should be emphasized that petitioner is not asking that there be, ipso facto, a reopening and rehearing on all post-induction-order conscientious objector claims; he is merely urging that the Regulation not be construed in such a manner as to inevitably foreclose the application of the very standards set forth in the Regulation. Petitioner would welcome the former holding, which would necessitate the complete invalidation of the Regulation, a holding which petitioner believes is warranted. See n. 27, *supra*.

[65]32 C.F.R. § 1624.1.

[66]32 C.F.R. Part 1626.

induction, and the attraction of successive delays by obstructionists has now been effectively foreclosed.[67] Congress in the 1967 Act abolished the complicated and time-consuming Department of Justice hearing procedures, which could often be used to delay induction by as much as two years.[68] It is also now impossible for a registrant to avoid induction by stalling past his twenty-sixth birthday.[69] The Act imposes criminal sanctions on anyone who makes any false statement with respect to his Selective Service classification.[70] This sanction, rather than cutting off all late-maturing claims for conscientious objector status upon the fear that some may be made in bad faith, is the appropriate method for the Government to use to discourage the making of false claims.

Selective Service has the additional authority to adjust its manpower calls at the state and national levels for the few cases where inductions might be postponed or cancelled in order to consider late-maturing conscientious objector claims which do meet the reopening standard. Such procedures are already

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[67]Given the heavy burden which a post-induction-order claimant must meet to get consideration of his claim and to prove his sincerity to the board, there is little reason why even registrants who merely wish to delay induction should wait until *after* an induction order has been mailed to file a bad faith claim. Under the new lottery system order of call, registrants are aware of the approximate month in which they will be called and can time any delay-seeking claim until just before their lottery number is reached. See note, 72 Yale L.J. at 1467.

[68]The 1967 Selective Service Amendments, P.L. 90-40, 81 Stat. 100 amended 50 U.S.C. App. § 456(j) to omit the Department of Justice hearing. See *United States v. Haughton*, 413 F.2d 736, 738 (9th Cir. 1969).

[69]32 C.F.R. § 1631.7(a).

[70]50 U.S.C. App. § 462(a).

used to provide for the large number of postponements due to student status and medical unfitness. This is illustrated by the fact that over 15% (54,524) of the registrants ordered to induction in 1968 were rejected at the induction center on physical grounds. Selective Service has accommodated to this reality by developing the practice of ordering an excessive number of registrants for induction.[71] There is absolutely no reason to think that a system which is used to a 15% physical drop-out rate cannot absorb the relatively small number of conscientious objectors which adoption of petitioner's position would create.

These safeguards—(1) the relatively few registrants who will file post-induction-order claims for conscientious objector status, (2) the power of the Government to discourage false claims through criminal sanctions, (3) the power of the local board to refuse to reopen a classification if the claim on its face shows it matured before the induction order was issued, (4) the expedient nature of the System's review of conscientious objector claims, (5) the power and demonstrated ability of the local board to compensate for postponements under Regulation 1631.7 (b), and (6) the power of the State and National Directors of Selective Service to adjust manpower calls to provide for the few cases where inductions will be delayed—make it certain that the administrative burden will be negligible if this Court reverses the decision below. It does mean that the System will

[71]Medical Statistics Agency, Supplement to *Health of the Army: Results of the Examination of Youth for Military Service, 1968* (Department of the Army, 1969).

have to make small accommodations to insure protection of all registrants who develop religious beliefs against participation in war, no matter when those beliefs crystallize. These small accommodations cannot outweigh the strong national policy and Congressionally-mandated exemption regarding conscientious objectors. As Justice Frankfurter so eloquently stated in a Selective Service case decided during the Korean War (dissenting):

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake and where prison may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness which have heretofore prevailed in this country, to be overborne by military exigencies.[72]

CONCLUSION

For the reasons stated herein, petitioner urges that this Court reverse the decision below and hold that the Regulation cannot validly preclude or be construed to preclude a local board from considering a registrant's claim of conscientious objection which

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[72] *United States v. Nugent*, 346 U.S. 1, 12-13 (1953), Frankfurter, J., dissenting. The issue in *Nugent* was whether a conscientious objector claimant had a right to a complete copy of the F.B.I. report carried out under the Department of Justice's pre-1967 hearing procedures.

crystallizes after the board has ordered the registrant to report for induction.

Dated: July 21, 1970.

Respectfully submitted,

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